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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAPTAIN ANTHONY T. RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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April 1998

26 pp

QUESTIONS PRESENTED

I

Whether the petitioner was denied due process of law guaranteed by the Fifth Amendment when he was found guilty of specifications 1 and 2 of Charge II despite the fact that the evidence was legally insufficient.

II

Whether the petitioner was denied his Fifth Amendment right to due process when the military judge denied the defense motion to dismiss Charge II (then Charge III) and its specifications for failure to state an offense.

III

Whether the petitioner was denied due process of law guaranteed by the Fifth Amendment when the military judge failed to correctly instruct the members regarding scienter, when he said that in order to convict petitioner they must be convinced that "he knew or believed" the persons depicted were under 18 years of age.

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II

PETITIONER WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT WHEN THE MILITARY JUDGE DENIED THE DEFENSE MOTION TO DISMISS CHARGE II (THEN CHARGE III) AND ITS SPECIFICATIONS FOR FAILURE TO STATE AN OFFENSE.

III

PETITIONER WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH

AMENDMENT WHEN THE MILITARY JUDGE FAILED TO CORRECTLY INSTRUCT THE MEMBERS REGARDING SCIENTER, WHEN HE SAID THAT IN ORDER TO CONVICT PETITIONER THEY MUST BE CONVINCED THAT "HE KNEW OR BELIEVED" THE PERSONS DEPICTED WERE UNDER 18 YEARS OF AGE.

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The petitioner, Captain Anthony T. Russell, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on January 23, 1998.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 47 M.J. 412 (1998), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM 31752), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on January 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3) (West Supp. 1996) and 10 U.S.C. § 867(a)(3) (West Supp. 1996).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides in relevant part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Petitioner was tried by general court-martial at Kadena Air Base, Okinawa, Japan, from May 30 through June 2, 1995. He was convicted of one specification of conduct unbecoming an officer and a gentleman by using military equipment to download pornographic materials, and one specification each of wrongfully receiving and possessing

materials depicting minors engaging in sexually explicit conduct, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 USC § 933 and 934, respectively. The petitioner was sentenced to confinement for 3 months, forfeiture of $2,858.00 pay per month for 3 months, and a dismissal.

On August 6, 1996, the Air Force Court of Criminal Appeals affirmed the findings and sentence. (No. ACM 31752) (Appendix B).

On April 9, 1997, the Court of Appeals for the Armed Forces granted review on the following issues of law:

I

WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN THE FINDINGS OF GUILTY UNDER SPECIFICATIONS 1 AND 2 OF CHARGE II.

II

WHETHER THE MILITARY JUDGE ERRED IN NOT GRANTING APPELLANT'S MOTION TO DISMISS CHARGE II (THEN CHARGE III) AND ITS SPECIFICATIONS FOR FAILURE TO STATE AN OFFENSE.

III

WHETHER THE MILITARY JUDGE FAILED TO CORRECTLY INSTRUCT THE MEMBERS REGARDING SCIENTER, WHEN HE SAID THAT IN ORDER TO CONVICT APPELLANT THEY MUST BE CONVINCED THAT "HE KNEW OR BELIEVED" THE PERSONS DEPICTED WERE UNDER 18 YEARS OF AGE.

On January 23, 1998, the Court of Appeals for the Armed Forces issued its decision, upholding the decision of the Air Force Court of Criminal Appeals. (Appendix A.) The Court found that there was sufficient evidence from which "a rational trier of fact" could "find guilt beyond a reasonable doubt" and conclude that petitioner knowingly possessed pornography involving minors. *Jackson v. Virginia*, 443 U.S. 307, 321, 99 S.Ct. 2781, 2790, 61 L.Ed.2d 560 (1979); *United States v. McGinty*, 38 M.J. 131 (CMA 1993). The Court found that the allegations that petitioner "wrongfully" possessed and received the pictures were sufficient to allege that he acted knowingly when he did so. The Court also found that the military judge's instructions concerning scienter were proper.

REASONS FOR GRANTING THE WRIT

I

PETITIONER WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT WHEN HE WAS FOUND GUILTY OF SPECIFICATIONS 1 AND 2 OF CHARGE II DESPITE THE FACT THAT THE EVIDENCE WAS LEGALLY INSUFFICIENT.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, *supra*.

The evidence was not sufficient for a reasonable factfinder to conclude, even considering the evidence in the light most favorable to the prosecution, that all of the elements for the specifications under Charge II were proven beyond a reasonable doubt. In particular, the elements, as stated by the military judge, (1) "that the producing of such visual depictions involved the use of a minor engaging in

sexually explicit conduct" and (2) "that the accused knew or believed that the producing of such visual depictions involved the use of a minor engaging in sexually explicit conduct, " were not proven beyond a reasonable doubt. (R. 517, 521.) The government never proved beyond a reasonable doubt that the individuals depicted in the questionable photographs who were said to be in lascivious poses were actually minors.

The critical issue in the case was whether the appellant knew that he was transmitting, receiving and in the possession of pictures depicting individuals under the age of eighteen in lascivious poses. The government's expert witness, Dr. Castellan, was called in an attempt to try to scientifically prove in some way the ages of the subjects depicted in the pictures. (R. 268.) Dr. Castellan testified that it was not possible to precisely determine the ages of the females in the pictures using the Tanner staging analysis. (R. 284.) When asked if he could be sure that the subjects of three photos in question were under eighteen, Dr. Castellan responded "[n]o, I think I am pretty sure that they are under the age of eighteen." (R. 287.) He also added that if the pictures had been altered in any way, then attempting to determine the age would be impossible.

The appellant testified about how he viewed the pictures using the thumbnail sketch presentation method, in small detail. (R. 336–339.) It was only after the select few pictures, hard copies, were shown to him in a different form and after he was constantly asked by an OSI agent during interrogation that he stated he thought one of the pictures depicted a female under eighteen. (R. 340–341.) The evidence is insufficient to show that the appellant knew that the ages of the females were under eighteen at the time the pictures were downloaded and stored. There is no evidence to show that the appellant viewed the pictures, if at all, in anything other than in the

form of small, thumbnail pictures in which detail sufficient to discern age would not be clear.

The evidence strongly suggests that the appellant obtained and possessed the few questionable pictures inadvertently. There was testimony that there were approximately 550–600 pictures on the appellant's home system. (R. 98.) The number of pictures with subjects of questionable age was approximately four. (R. 441.) The file in which they were found was one which contained pictures of adult females. It is clear from the evidence that the appellant was not looking for child pornography. The file name is selected and the pictures are downloaded without the ability to view the picture first. (R. 334.) One must download a picture to have the opportunity to view it. (R. 334.) If the appellant really wanted child pornography, there would have been many more pictures of a questionable nature on appellant's hard drives. The evidence is not there to find beyond a reasonable doubt that the pictures on his computers were obtained with his knowledge that the subjects were under eighteen.

II

PETITIONER WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT WHEN THE MILITARY JUDGE DENIED THE DEFENSE MOTION TO DISMISS CHARGE II (THEN CHARGE III) AND ITS SPECIFICATIONS FOR FAILURE TO STATE AN OFFENSE.

The military judge erred in refusing to dismiss Charge II (then Charge III) and its specifications as it failed to state an offense. As was argued in the motion submitted by trial defense counsel (App Ex. I), the two specifications under Charge II allege a violation of Title 18, United States Code,

¶ 2252(a). Specification 1 of Charge II alleges that the accused did "wrongfully transmit and receive in interstate or foreign commerce visual depictions of minors engaging in sexually-explicit conduct. . . ." Specification 2 of Charge II alleges that the accused did "wrongfully possess three or more depictions of minors engaging in sexually-explicit conduct. . . ." The cited statute requires that these alleged acts be done "knowingly," not "wrongfully." R.C.M. 307(c)(3) states: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." That was not done in this case. The Manual for Courts-Martial specifically requires that " when alleging a clause 3 violation, each element of the federal or assimilated statute must be alleged expressly or by necessary implication." *See* M.C.M., Part IV, ¶ 60c(6)(b). In this case, the knowledge element clearly required by Title 18 U.S.C. ¶ 2252(a) was not alleged at all. By alleging "wrongfully" instead of "knowingly" the specification is changed into a strict liability offense. The scienter element is applicable to the age of the performers as well as the nature of the material being transmitted. *See United States. v. X-Citement Video*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994). The legal meaning of "wrongfully" is distinctly different from that of "knowingly." The military judge erred when he found that by using the word "wrongfully", the element of "knowingly" was alleged by fair implication.

The word "wrongful" as defined in the U.C.M.J., under Article 112a, for example, is defined as "being without legal justification or authorization." *See* M.C.M., Part IV, ¶ 37(c)(5). It clearly is different from the meaning of "knowingly." "Knowingly" means having a specific intent, "being aware or cognizant of." Webster's New World Dictionary, 3rd Col Ed.,1988. It should have been set out as a separate element. The word "knowingly" does not appear anywhere in either of the two specifications of the Charge.

The 9th Circuit Court of Appeals addressed this issue in the case of *U.S. v. Thomas*, 893 F.2d 1066 (9th Cir. 1990). In that case, the court held that the failure of the government to include "knowingly" in the indictment did not render that particular indictment insufficient because, read in its entirety, the indictment sufficiently stated that the accused could only be convicted for an act done knowingly. *Thomas*, at 1070. This is not the situation in the present case. The word "knowingly" does not appear anywhere in the charges or specifications. No words are contained in the specifications to indicate that each alleged violation is anything other than a strict liability offense. The word "wrongfully" is simply not an element of the offense, nor is it an adequate substitute for the word "knowingly."

This Honorable Court has made clear that scienter is an element of Title 18 U.S.C. ¶ 2252. By failing to include this essential element in either of the two specifications of Charge II (formerly Charge III), the government has failed to state an offense under the statute. The military judge committed prejudicial error when he failed to grant trial defense counsel's Motion to Dismiss Charge II (formerly Charge III) and its specifications.

III

PETITIONER WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT WHEN THE MILITARY JUDGE FAILED TO CORRECTLY INSTRUCT THE MEMBERS REGARDING SCIENTER, WHEN HE SAID THAT IN ORDER TO CONVICT PETITIONER THEY MUST BE CONVINCED THAT "HE KNEW OR BELIEVED" THE PERSONS DEPICTED WERE UNDER 18 YEARS OF AGE.

Defense counsel objected at trial to the instruction given by the military judge on the issue of scienter. (R. 434–435.) The judge at trial cited the Air Force Court of Criminal Appeal's decision in *United States v. Maxwell*, 42 M.J. 568 (A.F.Ct.Crim.App. 1995), to justify the language of his instruction to the court-members that in order to convict the accused of Charge II and the specifications thereunder they must find that the accused knew "or believed" that the ages of the persons depicted were under the age of 18. The instruction permitted the court members to find the appellant guilty without actual knowledge that minors were depicted in the prosecution exhibits, and without sufficient evidence that they were in fact minors.

The Court of Appeals for the Armed Forces also granted review of this issue when it obtained jurisdiction of the *Maxwell* case. *United States v. Maxwell*, 45 M.J. 406 (1996). The Court found, based on the evidence in that case, that the instruction containing the language "or believed" was proper. The Court stated, "[h]owever, we do not believe that in taking steps to eradicate the evil of child pornography, Congress intended to erect a virtually insuperable barrier to prosecution by requiring that the recipient or a distributor of pornography must have knowledge of the actual age of the subject . . ." *Maxwell*, 45 M.J. at 424. However, the Court went on to state, ". . . we recognize that a reasonable belief that the individuals depicted were of legal age might be a defense, but that is not an issue here." *Id.*

In the case *sub judice*, this defense is an issue. As the military judge himself stated during an Article 39(a) session in which instructions on findings were discussed, "[t]here was no clear-cut testimony (presented during the trial) that, '[y]es, indeed, I certainly believe these are minors.' There was waffling testimony at best, I think." (R. 481.) This case is therefore distinguishable from *Maxwell*.

The appellant also cites *United States v. X-Citement Video, Inc., supra*, which says the scienter element goes to knowledge of the accused. This Honorable Court found in *X-Citement* that the accused must have "knowingly" received depictions of minors. This Honorable Court stated, "we conclude that the term 'knowingly' in (18 U.S.C) ¶ 2252 extends both to the sexually explicit nature of the material and to the age of the performers." Nowhere in the statute or the majority opinion of this Honorable Court are the words "or believed" used. To expand the meaning of "knowingly" to include "or believed " is not a fair inference. If it was the intent of Congress it would have been specifically stated, at least somewhere in the statute.

The government's own expert, in this case, was only "pretty sure" that the individuals shown in the questionable photos were under 18 years of age. (R. 287.) With respect to those pictures, the members may have decided that if the expert did not know their age, the appellant, likewise, did not know their age. Under the military judge's instruction, they were nonetheless permitted to convict the appellant if they found that he **thought** they were under 18 years of age, even though he didn't know.

Finally, the military judge's instruction allowed the court-members to find the appellant guilty even though the prosecution had not proven, beyond a reasonable doubt that the individuals depicted in the pictures were under the age of 18. Appellant was able to be found guilty because the court-members believed that the appellant himself thought they were under 18. Therefore, applying the judge's instruction, appellant was found guilty of the crime based on his belief. The Court of Appeals for the Armed Forces stated in *Maxwell*, ". . . we are satisfied that the *crucial fact* which the Government *had to prove* was that the subjects were minors. *That being the case*, as it was here, it then was only necessary

to prove that appellant believed they were minors." *Maxwell*, 45 M.J. at 424. (Emphasis added.) Since that fact (the subjects were minors) was not proven in appellant's case, the instruction containing the language "or believed" was erroneous and appellant was prejudiced and wrongfully convicted because of it.

CONCLUSION

The petitioner was denied due process under the Fifth Amendment when he was found guilty of specifications 1 and 2 of Charge II despite there being insufficient evidence; when the military judge denied the defense motion to dismiss Charge II (then Charge III) and its specifications; and when the military judge failed to correctly instruct the members regarding scienter, when he said that in order to convict petitioner they must be convinced that "he knew or believed" the persons depicted were under 18 years of age.

Respectfully submitted,

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April 1998

APPENDIX A

UNITED STATES, Appellee,

v.

Anthony T. RUSSELL, Captain,
U.S. Air Force, Appellant.

No. 96–1364.

Crim.App. No. 31752.

U.S. Court of Appeals for
the Armed Forces.

Submitted June 5, 1997.

Decided Jan. 23, 1998.

Accused was convicted by general court-martial, Donald E. Walsh, J., of conduct unbecoming officer and gentleman, and of wrongfully receiving and possessing materials depicting minors engaging in sexually explicit conduct. The United States Air Force Court of Criminal Appeals affirmed. Review was granted. The United States Court of Appeals for the Armed Forces, Cox, Chief Judge, held that: (1) evidence supported conviction for wrongfully receiving and possessing materials in question, and (2) specifications were sufficient to state offense.

Affirmed.

1. Military Justice ⊶ 793

Evidence supported conviction for wrongfully receiving computer graphics depicting minors engaging in sexually

explicit conduct; accused admitted in pretrial statement that he guessed that females in pictures were 13 years of age and older, pediatrician testified that, based on known medical standards, females shown in exhibits were not more than 15½ years of age, and members were able to look at pictures and use their common sense and experience to conclude that girls were under age of 18. UMCJ, Art. 934, 10 U.S.C.A. § 934.

2. Military Justice ⊶ 792

Specifications alleging that accused "wrongfully" possessed and received visual depictions of minors engaging in sexually explicit conduct were sufficient to state offense; specifications were sufficient to allege that accused acted knowingly, and they also protected him from any future prosecution for same conduct. UMCJ, Art. 934, 10 U.S.C.A. § 934.

3. Military Justice ⊶ 953.1

Specification is sufficient so long as elements may be found by reasonable construction of other language in challenged specification.

4. Military Justice ⊶ 790, 832

Accused's assertion that he inadvertently came into possession of materials depicting minors engaging in sexually explicit conduct and then decided to retransmit those images was not defense to charge of wrongfully receiving and possessing materials, as accused did not claim that he believed young girls shown in pictures were over age of 18. UMCJ, Art. 934, 10 U.S.C.A. § 934.

For Appellant: *Lieutenant Colonel Kim L. Sheffield* and *Major Kevin P. Koehler* (on brief); *Colonel David W. Madsen.*

For Appellee: *Colonel Theodore J. Fink, Lieutenant Colonel Michael J. Breslin,* and *Major Karen L. Manos* (on brief).

Opinion of the Court

COX, Chief Judge:

Appellant was tried by general court-martial at Kadena Air Base, Okinawa, Japan, from May 30 through June 2, 1995. He was convicted of one specification of conduct unbecoming an officer and a gentleman by using military computers to download pornographic materials, and one specification each of wrongfully receiving and possessing materials depicting minors engaging in sexually explicit conduct, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 USC §§ 933 and 934, respectively. He was sentenced to confinement for 3 months, forfeiture of $2,858.00 pay per month for 3 months, and dismissal from the Air Force. The convening authority approved the sentence, and the Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion.

We granted appellant's petition for review to consider three issues.* Finding no error, we affirm the decision of the court below.

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*The issues granted for review were:

I

WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN THE FINDINGS OF GUILTY UNDER SPECIFICATIONS 1 AND 2 OF CHARGE II.

II

WHETHER THE MILITARY JUDGE ERRED IN NOT GRANTING APPELLANT'S MOTION TO DISMISS CHARGE II (THEN CHARGE III) AND ITS SPECIFICATIONS FOR FAILURE TO STATE AN OFFENSE.

[1] Appellant first contends that the evidence is insufficient to sustain his conviction of wrongfully receiving computer graphics depicting minors engaging in sexually explicit conduct. However, in a pretrial statement appellant admitted that he guessed that the females in the pictures were 13 years of age and older. Also, a pediatrician testified that, based on known medical standards, the females shown in the exhibits were not more than 15½ years of age. Finally, the members were able to look at the pictures and use their common sense and experience to conclude that the girls were under the age of 18. Therefore, there was sufficient evidence from which "a rational trier of fact" could "find guilt beyond a reasonable doubt" and conclude that appellant knowingly possessed child pornography. *Jackson v. Virginia,* 443 U.S. 307, 321, 99 S.Ct. 2781, 2790, 61 L.Ed.2d 560 (1979); *United States v. McGinty,* 38 MJ 131 (CMA 1993).

[2,3] Next, appellant argues that the military judge should have dismissed the specifications of the second Charge because it failed to state an offense. The specifications alleged that appellant violated the third clause of Article 134 in that he did

> wrongfully transmit and receive in interstate or foreign commerce visual depictions of minors engaging in sexually explicit conduct . . . [and that he did], in places owned, leased, or used by the government of the United States, wrongfully

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III

WHETHER THE MILITARY JUDGE FAILED TO CORRECTLY INSTRUCT THE MEMBERS REGARDING SCIENTER, WHEN HE SAID THAT IN ORDER TO CONVICT APPELLANT THEY MUST BE CONVINCED THAT "HE KNEW OR BELIEVED" THE PERSONS DEPICTED WERE UNDER 18 YEARS OF AGE.

> possess three or more visual depictions of minors engaging in sexually explicit conduct, in violation of Title 18, United States Code, Section 2252(a).

Specifically, appellant argues that the specifications are deficient in that they fail to allege that he knowingly possessed these materials.

A specification is sufficient "so long as [the elements] may be found by reasonable construction of other language in the challenged specification." *United States v. Brecheen,* 27 MJ 67, 68 (CMA 1988); *see United States v. Watkins,* 21 MJ 208 (CMA 1986). The question here is whether the term "wrongfully," as used in the specifications, is broad enough to imply guilty knowledge, as well as whether the reference to 18 USC § 2252(a) gave appellant notice of the knowledge requirement.

At trial, appellant's counsel conceded that he had not been hampered in his preparation for trial by the perceived deficiency in the specifications. Thus, only legal, not actual, knowledge is at issue here.

The Supreme Court has held "that the term 'knowingly' in [18 USC] § 2252 extends both to the sexually explicit nature of the material and to the age of the performers" depicted therein. *See United States v. X-Citement Video, Inc.,* 513 U.S. 64, 78, 115 S.Ct. 464, 472, 130 L.Ed.2d 372 (1994). Moreover, the military judge instructed the court members that they were required to find beyond a reasonable doubt that appellant knew or believed that the subjects in the pictures were under the age of 18. Thus, the allegation that appellant "wrongfully" possessed and received the pictures was sufficient to allege that he acted knowingly when he did so.

Taking these factors together, the specifications are more than adequate to protect appellant from any future prosecution for the same conduct. Thus, the military judge did not err

when he refused to dismiss the Charge and its specifications for failure to state an offense.

[4] Finally, appellant asserts that the instructions given in his trial were improper. However, we recently upheld identical instructions in *United States v. Maxwell,* 45 MJ 406, 426 (1996). Although there we opined that an accused might be able to defend against this type of charge by showing that he reasonably believed the subjects depicted were of legal age, that is not what happened here. Appellant's defense was not that he believed the young girls shown in the pictures were over the age of 18. Rather, he asserted that he inadvertently came into possession of the pictures and then decided to retransmit the images.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judges SULLIVAN, CRAWFORD, GIERKE and EFFRON concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain ANTHONY T. RUSSELL, 447–80–8539
United States Air Force

ACM 31752

6 August 1996

Sentence adjudged 2 June 1995 by GCM convened at Kadena Air Base, Japan. Military Judge: Donald E. Walsh.

Approved sentence: Dismissal, confinement for 3 months, and forfeiture of $2,858.00 pay per month for 3 months.

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Captain Kevin P. Koehler.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise and Major R. Scott Howard.

Before

DIXON, SCHREIER, and STARR
Appellate Military Judges

PER CURIAM:

Members convicted the appellant, contrary to his pleas, of violating Article 133, UCMJ, by using Air Force equipment to locate, download and store pornographic computer graphics including images of nude children; and violating Article 134, UCMJ, by knowingly transmitting and receiving, in interstate or foreign commerce (Specification 1) and possessing three or more (Specification 2) visual depictions of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a). The convening authority approved the court's sentence of a dismissal, confinement for three months, and forfeiture of $2858 per month for three months. The appellant presents six assignments of error, all of which we reject. We find no error prejudicial to the appellants substantial rights, and we affirm the approved findings and sentence.

The appellant first claims the evidence is factually and legally insufficient to sustain his conviction of both specifications alleged under the federal statute because the prosecution did not establish that he knew the persons depicted were under the age of eighteen, the statutory definition of "minor." The appellant downloaded and stored computer graphics showing many images of people nude or engaged in explicit sexual activity, or both. Of these, the military judge limited the members' consideration to eight exhibits depicting four different images, seized from the appellant's office and home computers. In order to establish that those depicted in the eight exhibits were under eighteen and that the appellant knew—or believed—that, the prosecution presented the appellant's written statement to the AFOSI, in which he wrote that he "guessed" the youngest person depicted was thirteen years old. The prosecution also presented the testimony of an expert in pediatrics, who opined that the maximum age of those depicted in the exhibits was about fifteen and a half years old, that it was not medically

reasonable to believe they were over eighteen, and that it was reasonable for a person looking at the pictures to conclude they were thirteen.

The appellant testified that he had been "yelled at" by the AFOSI and cajoled into writing he guessed the youngest was thirteen. According to the appellant, he did not examine the images until he had moved them from his office computer (where he had taken them off the internet) to his home computer. When he did examine them, he decided to discard them because of their poor quality but had not yet deleted them. He testified he had not considered their ages. He denied knowingly retrieving images of "underage" females, but conceded on cross-examination that he thought some of them might be under eighteen, and he did not think they were over eighteen.

Based on the evidence, the members were entitled to find beyond a reasonable doubt the appellant knew or believed those depicted in the eight prosecution exhibits were minors. *Jackson v. Virginia,* 443 U.S. 307 (1979). Furthermore, after carefully weighing the evidence, we are likewise convinced beyond a reasonable doubt of this fact. *United States v. Turner,* 25 MJ. 324 (C.M.A. 1987). We therefore resolve this issue against the appellant.

The appellant next claims the military judge erred in not dismissing the 18 U.S.C. § 2252(a) specifications for failure to state offenses, because both specifications substituted "wrongfully' for "knowingly," which is found in the statute. The appellant raised this by way of a pretrial motion. The trial defense counsel conceded the issue was one of legal notice rather than actual notice, and that the defense had not been in any way handicapped in its pretrial preparation. The military judge denied the motion, concluding that the knowledge element had been alleged by fair implication and was sufficiently precise to protect the appellant from future

prosecution for the same offenses. At the conclusion of the evidence, the military judge instructed the members using the statutory language rather than the word "wrongfully." We find no error in the military judge's ruling, and we resolve this issue against the appellant. *See United States v. LeProwse,* 26 M.J. 652 (A.C.M.R. 1988), *pet. denied,* 27 M.J. 475 (C.M.A. 1988).

We likewise reject the remaining assignments of error. The military judge did not err in failing to grant the defense challenge for cause against the court president. *United States v. Blocker,* 32 M.J. 281 (C.M.A. 1991). The military judge did not err by admitting photographs of computer images instead of limiting the prosecution to showing the images on a monitor. *United States v. Maxwell,* 42 M.J. 568, 581 (A.F. Ct. Crim.App. 1995). The military judge did not err by instructing the members they could convict the appellant of the 18 U.S.C. § 2252(a) specifications if they found he knew or believed the images were of minors. *Maxwell,* 42 M.J. at 582. Finally, we cannot say the appellant's approved sentence is inappropriately severe. *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982).

The findings and the sentence are correct in law and fact and are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court